

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-221584.3 DATE: April 16, 1986
MATTER OF: Sealtech, Inc.

DIGEST:

GAO will not review the Small Business Administration's refusal to issue a certificate of competency (COC) where the protester fails to make a showing that it stemmed from fraud or bad faith, does not identify any material information not considered, and fails to demonstrate how it was prejudiced by any alleged deficiencies in the record which it had the burden and the opportunity to correct in making its application for a COC.

Sealtech, Inc. (Sealtech), protests the refusal of the Defense Logistics Agency (DLA) to award it the small business set-aside portion of invitation for bids No. DLA100-85-B-1205, for the supply of goggles. Sealtech questions DLA's finding that the firm is nonresponsible for the set-aside portion of the requirement, pointing out that the Small Business Administration (SBA) has issued a certificate of competency (COC) to Sealtech for the unrestricted portion. We dismiss the protest.

When the apparent low bid under the solicitation was rejected as nonresponsive, Sealtech became next in line for award for both the set-aside portion (164,496 pairs of goggles) and the unrestricted portion (164,544 pairs) of the requirement. DLA therefore requested the appropriate Defense Contract Administration Services Management Area (DCASMA) to conduct a preaward survey on Sealtech.

DCASMA found that Sealtech, which had not previously produced similar goggles for the government, lacked sufficient quality control organization and personnel to assure compliance with the quality requirements of the solicitation. It pointed out that Sealtech's proposed source for the rubber compound used in manufacturing the goggles had indicated that it could not comply with all the requirements of the solicitation. In addition, DCASMA personnel expressed concern at Sealtech's poor business profile, as reported by an independent financial reporting service, and at Sealtech's lack of an operating line of credit.

Accordingly, DLA found Sealtech's technical production, quality assurance and financial capabilities to be unsatisfactory and it recommended against award to the firm.

The contracting officer therefore proposed to reject Sealtech's bid on the grounds that the firm was nonresponsible due to a lack of capacity and credit. Since, however, Sealtech is a small business concern, the question of its responsibility to perform both the unrestricted and set-aside portions of the procurement was referred to the SBA for possible issuance of a COC.

In the meantime, Sealtech protested to our Office any award to another firm, alleging that the preaward survey was inadequate. In particular, Sealtech noted that DCASMA had indicated that because Sealtech listed the wrong telephone number on the first page of its offer, DCASMA personnel were unable to contact the firm to arrange for an appointment to inspect its facilities for the production portion of the preaward survey. Sealtech pointed out, however, that the firm had listed the correct telephone number in the space on page 30 for indicating the authorized negotiator and alleged that a DCASMA employee in fact contacted the firm to conduct a desk survey of Sealtech's quality control organization.

In our decision upon Sealtech's protest, we pointed out that the SBA has conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business' responsibility by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7) (1982). Consequently, we will not undertake an independent review of a contracting officer's nonresponsibility determination where the SBA affirms the determination by refusing to issue a COC. Moreover, in light of the SBA's statutory authority, we will not review the SBA decision unless there is a showing that it stemmed from fraud or bad faith or unless it is alleged that the SBA did not follow its own regulations or did not consider material information. See Consolidated Marketing Network Inc., B-218104, Feb. 12, 1985, 85-1 C.P.D. ¶ 190.

In view of the SBA's statutory authority and the possibility that the SBA might issue a COC, in which case there might be no need for a decision by our Office, we dismissed Sealtech's protest. Sealtech, Inc.--Request for Reconsideration, B-221584.2, Mar. 13, 1986, 86-1 C.P.D. ¶ ____. We indicated, however, that if the SBA declined to issue a COC, Sealtech could protest to our Office and we

would examine its allegations to determine whether the circumstances permitted our review of the SBA's determination.

Although the SBA in fact issued a COC certifying Sealtech's responsibility under the solicitation, it informed DLA that the COC was "for the unrestricted portion only." Accordingly, DLA refused to make award to Sealtech for the set-aside portion of the requirement, maintaining that the firm was not a responsible offeror for that portion. Sealtech thereupon filed this protest with our Office.

Sealtech maintains that the contracting officer had lacked accurate information about the firm's production capabilities; that there is "incorrect information" in "the government files;" and that the "previous negative determination is based on irrelevant and inaccurate information and is discriminatory." The protester argues that before the contracting officer proceeds with an award of the set-aside portion, she must re-examine Sealtech's responsibility and if the determination is negative the "[contracting officer] has the responsibility to refer it to the SBA for a COC determination."

We note, however, that the contracting officer already had referred to the SBA the question of Sealtech's responsibility as to both the unrestricted and set-aside portions of the procurement, and that the SBA granted a COC which was expressly limited to the "unrestricted portion only." The SBA, therefore, already has denied Sealtech a COC for the set-aside portion and we are aware of no requirement that the contracting officer make a second determination of Sealtech's responsibility and, if it is negative, make a second referral to the SBA for a COC.

As we indicated above, we will not review the SBA's refusal to issue a COC unless there is a showing that it stemmed from fraud or bad faith or unless it is alleged that the SBA did not follow its own regulations or did not consider material information.

Sealtech, however, makes no showing of fraud or bad faith. The W. H. Smith Hardware Co., B-219327.4, Oct. 8, 1985, 85-2 C.P.D. ¶ 391 (to establish bad faith requires the presentation of virtually irrefutable proof that government officials had a specific and malicious intent to injure the protester).

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At most, its allegations amount to an argument that as a result of the inadequacy of the preaward survey, the information available to the SBA was incorrect and the SBA failed to consider material information. Sealtech, however, does not identify and correct any specific factual inaccuracies or omissions even though a copy of the preaward survey had been provided to Sealtech in the administrative report responding to its prior protest and even though Sealtech claims to have gained insight into inaccuracies in the government's information as a result of the SBA's questions. Cf. Franklin Wire & Cable Co.--Reconsideration, B-218557.2, et al, June 5, 1985, 85-1 C.P.D. ¶ 644 (objection to SBA's conclusions rather than to the facts upon which the conclusions were based).

In any case, once the contracting officer has submitted to the SBA adequate information to show that the bidder is nonresponsible, it is incumbent upon the bidder to submit all relevant information and prove through its application to the SBA for a COC that it is responsible. Sealtech has not shown how it was prejudiced by any deficiencies in the record which Sealtech had the burden and the opportunity to correct in making its application for a COC. Cf. R.S. Data Systems--Reconsideration, B-220961.2, Dec. 18, 1985, 65 Comp. Gen. ___, 85-2 C.P.D. ¶ 687.

The protest is dismissed.



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